FILE COPY

No. 526

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

THE F. & M. SCHAEFER BREWING CO.,
Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

RUSSELL D. MORRILL,
14 Wall Street,
New York 5, New York,
Attorney for Appellant

FRANCIS L. CASEY,
Of Counsel.

INDEX

	PAGE
STATEMENT AS TO JURISDICTION	1
Opinions Below	2
Jurisdiction	2
Statutes	3
Question Presented	3
STATEMENT OF THE CASE	3
Facts	3
Raising Federal Question Below	6
The Federal Questions are Substantial	7
CONCLUSION	12
Appendix A	
1. Opinion of the Court of Appeals	13
2. Judgment of the Court of Appeals	18, 19
Appendix B	
Statutes and Regulations Involved	21

CITATIONS

CASES:

Adams Mfg. Co. v. *Storen*, 304 U. S. 307 (1938)	3, 8
American Mfg. Co. v. *St. Louis*, 250 U. S. 459 (1919)	7
Bryant v. *Zimmerman*, 278 U. S. 63 (1928)	7
Crew Levick Co. v. *Pennsylvania*, 245 U. S. 292 (1917)	6

PAGE

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S. 282, 290 (1921) 6
Dept. of Banking v. *Pink*, 317 U. S. 264 (1942) ... 2
Department of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62 (1941) 8, 10

Fisher's Blend Station v. *Tax Commission*, 297 U. S. 650 (1936) 7
Freeman v. *Hewit*, 329 U. S. 249 (1946) 2
Furst v. *Brewster*, 282 U. S. 493 (1931) 6

General Trading Co. v. *Tax Comm'n*, 322 U. S. 335 (1944) 8
Gloucester Ferry Co. v. *Pennsylvania*, 114 U. S. 196 (1885) 6
Gwin, White & Prince, Inc. v. *Henneford*, 305 U. S. 434 (1939) 11

Harvester Co. v. *Dept. of Treasury*, 322 U. S. 340 (1944) 8, 10
Henneford v. *Silas Mason Co.*, 300 U. S. 577, 587-8 (1937) 9

International Textbook Co. v. *Pigg*, 217 U. S. 91 (1910) 6

Joseph v. *Carter & Weekes Co.*, 330 U. S. 422 (1947), affirming 294 N. Y. 906 ..... 7, 9, 10

Kelley v. *Rhoads*, 188 U. S. 1 (1903) 6

Matter of New Yorker Magazine v. *Gerosa*, 3 N. Y. 2d 362 (1957), appeal dismissed, 356 U. S. 339 .. 9
Matter of Steinbeck v. *Gerosa*, 4 N. Y. 2d 302 (1958) 10
Matter of United Air Lines v. *Joseph*, 282 App. Div. 48 (1953), aff'd no opinion, 307 N. Y. 762 (1954) 9, 10

PAGE

McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, 48 (1940) 7, 9, 11
McLeod v. *Dilworth Co.*, 322 U. S. 327 (1944) 8
Memphis Steam Laundry v. *Stone*, 342 U. S. 389 (1952) 2
Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U. S. 157 (1954) 2
Minnesota v. *Northwestern States Portland Cement Co.*, Docket No. 12, October 1958, Term, 250 Minn. 32, 84 N. W. 2d 373 11

New Jersey Ins. Co. v. *Div. of Tax Appeals*, 338 U. S. 665 (1950) 8, 11

Railway Express Agency v. *Virginia*, 347 U. S. 359 (1954) 11
Richfield Oil Corp. v. *State Board*, 329 U. S. 69 (1946) 3, 6

Society for Savings v. *Bowers*, 349 U. S. 143 (1955) 11
Spector Motor Service v. *O'Connor*, 340 U. S. 602 (1951) 7
Stockham Valves & Fittings, Inc. v. *Williams*, Docket No. 33, October 1958, Term, 101 S. E. 2d 197 11
Swift & Co. v. *United States*, 196 U. S. 375 (1905) 6

United Piece Dye Works v. *Joseph*, 282 App. Div. 60, aff'd without opinion, 307 N. Y. 780 (1954), *cert. denied*, 348 U. S. 916 (1955) 9, 10
United States v. *Simpson*, 252 U. S. 465 (1920) ... 6

Werner Machine Co. v. *Director of Div. of Taxation*, 350 U. S. 492 (1956) 8
West Point Grocery Co. v. *Opelika*, 354 U. S. 390 (1957) 2
Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938) 10

STATUTES: PAGE

Constitution of the United States
Article I, Section 8, Clause 3 2

28 U. S. C. § 1257(2) 2

Article 78 of the New York Civil Practice Act ... 2

New York State General City Law, Article 2-B
§ 24-a 3, 21

New York City Administrative Code
§ B46-2.0 ..... 3, 21

Rules and Regulations of New York City Agencies, 1938-1946

Article 101 22
Article 104 22
Article 209 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No._____

THE F. & M. SCHAEFER BREWING CO.,

Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

STATEMENT AS TO JURISDICTION

Appellant appeals from the final order and judgment and remittitur of the Court of Appeals of the State of New York, entered on June 25, 1958, affirming the order of the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, which confirmed a determination of the Comptroller of the City of New York assessing additional New York City business taxes against appellant for the years 1948 through 1951, both inclusive.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A, *infra*, p. 13) is reported at 4 N. Y. 2d 423. The order of the Appellate Division, rendered without opinion, is reported at 3 App. Div. 2d 898.

Jurisdiction

This is a proceeding pursuant to Article 78 of the New York Civil Practice Act to review a final determination of the Comptroller of the City of New York that there is due from the appellant and payable to the City of New York a deficiency of business tax under the Administrative Code of the City of New York for the years 1948 through 1951, both inclusive. Appellant sought review of said determination on the ground that the New York City law imposing the tax for the privilege of doing business as applied to the unapportioned gross receipts of appellant from sales to out-of-state customers infringed the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). The judgment of the New York State Court of Appeals affirmed a final order of the Appellate Division which confirmed the Comptroller's determination and upheld the validity of the New York law as thus applied. The judgment of the Court of Appeals of the State of New York from which this appeal is taken was dated and entered June 25, 1958 (Appendix A, *infra*, p. 18) and is final. *Dept. of Banking* v. *Pink*, 317 U. S. 264 (1942). The notice of appeal was filed in the Supreme Court of the State of New York, New York County, on September 22, 1958.

Jurisdiction of this appeal is conferred on this Court by 28 U. S. C. § 1257(2). Cases sustaining the jurisdiction of this Court on such appeal include *West Point Grocery Co.* v. *Opelika*, 354 U. S. 390 (1957); *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U. S. 157 (1954); *Memphis Steam Laundry* v. *Stone*, 342 U. S. 389 (1952); *Freeman* v.

Hewit, 329 U. S. 249 (1946); *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946); *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307 (1938).

Statutes

The statutes, the validity of which is drawn in question on the ground of being repugnant to the Commerce Clause of the Constitution of the United States, are § 24-a of the New York State General City Law (McKinney's Cons. Laws of New York, Book 20, General City Law, Article 2-B, § 24-a, L. 1941, Ch. 199, § 1, as amended) and § B46-2.0 of the New York City Administrative Code, as amended by Local Law No. 44 of 1948, Local Law No. 72 of 1950, Local Law No. 76 of 1952. These statutes and the regulations are set forth in pertinent part in Appendix B, *infra*, pp. 21-23.

Question Presented

Whether the Commerce Clause of the Constitution is infringed by a New York City law imposing a tax held, first, to be on the privilege of doing business measured by gross receipts of the business and, later, held to be on a local event separate from commerce as applied to a local manufacturer and measured by the unapportioned gross receipts from sales to out-of-state customers delivered within the state for immediate interstate transportation.

STATEMENT OF THE CASE

Facts

Appellant, The F. & M. Schaefer Brewing Co., a New York corporation, was at all times here in question engaged in the business of brewing and selling beer. Appellant's brewery was located in Brooklyn, New York, and it delivered beer in its own trucks to retail customers in New York City and the metropolitan area, including points in New Jersey. Appellant also sold beer outside the metro-

politan area and outside the State of New York to wholesale distributors who had been selected as sole distributors of its products in the territory assigned. Only sales to such wholesale distributors located outside the State of New York are involved in this proceeding. Such distributors were licensed to deal in beer in the states outside the State of New York where they did business but they were not licensed to deal in beer in the State of New York.

All sales to these out-of-state distributors were handled by appellant in the same manner. Initially an order was transmitted by mail or telephone by the distributor from his place of business outside New York State to appellant's brewery in Brooklyn specifying the quantities of draught or packaged beer and the date it was desired. On the basis of the order appellant checked the distributor's credit and prepared a delivery ticket on which was set forth the name and address of the distributor, the name of the trucker which was to transport the beer, and the types and quantities of beer desired.

On the day the beer was to be picked up, a truck arrived at appellant's brewery at 430 Kent Avenue, Brooklyn, New York, and the driver presented a written "pickup order" signed by the distributor as is required by the New York State Alcoholic Beverage Control Law, covering the order previously phoned or mailed in. The truck was loaded and checked by appellant's employees and the delivery ticket was signed by the driver of the truck and the employee of appellant who had checked the loading. The truck was then sealed by appellant's employees, and the truck left the brewery with the sealed load of beer for transportation directly to the place of business of the distributor outside the State of New York.

From the delivery ticket appellant prepared an invoice which was mailed to the distributor.

All of the truckers transporting the beer from appellant's brewery to the distributors were selected and ar-

ranged for by the distributors. The truckers were of three classes:

(1) *Common Carriers.* Truckers who operated motor vehicles as common carriers under certificates granted by the Interstate Commerce Commission.

(2) *Contract Carriers.* Truckers who operated motor vehicles as contract carriers under permits granted by the Interstate Commerce Commission and had contracts with the distributors for whom they transported beer.

(3) *Distributors' Own Trucks.* Trucks which were owned or leased and operated by the distributors themselves.

All trucks of all three classes were registered with the New York State Liquor Authority and had permits to transport alcoholic beverages in the State of New York. None of the distributors or truckers was licensed to sell alcoholic beverages in the State of New York.

Appellant reported on its New York City business tax returns for the privilege periods beginning July 1, 1948, 1949, 1950 and 1951, the receipts from all sales to customers outside the State of New York during the calendar years 1948 through 1951 (whether transported by appellant's own trucks or by trucks sent to the brewery by the customer) as receipts from interstate commerce which were allocable according to the formula prescribed by the regulations. Appellant paid the tax measured by the portion of such receipts allocated to business in the City of New York.

The appellee, Comptroller, determined on audit that the receipts from sales to out-of-state customers transported by appellant's trucks were from interstate commerce and allocable but that receipts from all of appellant's sales to out-of-state distributors which were transported by common carrier, contract carrier or distributors' own trucks which were sent to and called at appellant's brewery in Brooklyn were receipts from intrastate business and includible in the

measure of the tax without apportionment. On this basis Comptroller determined a deficiency of business tax with penalty and interest of $43,796.10. After formal hearings the Comptroller finally determined that only those receipts from sales to out-of-state distributors as were transported by common carrier trucks were in interstate commerce and allocable and that receipts from sales where the beer was transported by contract carriers or distributors' trucks were intrastate and were used in their entirety without allocation or apportionment in calculating the deficiency of tax.

Appellant's business of selling to its out-of-state customers, beer which was transported by whatever means across state lines and imported into other states, constituted interstate commerce. *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910); *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, 290 (1921); *Furst* v. *Brewster*, 282 U. S. 493 (1931); *Swift & Co.* v. *United States*, 196 U. S. 375 (1905); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (1885); *Kelley* v. *Rhoads*, 188 U. S. 1 (1903); *United States* v. *Simpson*, 252 U. S. 465 (1920); *Richfield Oil Corp.* v. *State Board*, *supra*.

Raising Federal Question Below

At the formal hearings before the Referee appointed by the Comptroller, appellant asserted its right to have receipts from sales to out-of-state customers treated as receipts from interstate commerce and apportioned in calculating the tax and contended that the failure to apportion the receipts from such interstate shipments, whether by common carrier, contract carrier or distributor's own truck, was in violation of the Commerce Clause of the Constitution of the United States. In its petition to the Supreme Court of the State of New York for review of the Comptroller's determination, pursuant to provisions of Article 78 of the Civil Practice Act, appellant averred that the deficiency of

tax determined on the unallocated receipts from sales in interstate commerce was in violation of the Commerce Clause of the Constitution of the United States. Also, in their briefs before the Appellate Division and the Court of Appeals of the State of New York both appellant and appellee argued the issue under the Commerce Clause of the Constitution of the United States. Both the Appellate Division and the Court of Appeals rejected this contention and upheld the validity of the tax. The Court of Appeals' opinion (Appendix A, *infra*, p. 13) clearly demonstrates that it passed upon the issue under the Commerce Clause of the Federal Constitution in reaching its decision upholding the validity of the law and the tax. *Bryant* v. *Zimmerman*, 278 U. S. 63 (1928).

The Federal Questions are Substantial

State taxation of interstate commerce or its gross receipts unhampered by the Commerce Clause would permit a multiple burden on that commerce which has been held to be ground for its invalidation. Taxes on the privilege of doing interstate commerce, like taxes aimed at or which discriminate against it have been described as forbidden regulations. However, where a local incident separated from the commerce is selected as the taxable event that has been held to be a permissible levy. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940); *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422, 429 (1947). The validity of a state tax against the challenge that it infringes the Commerce Clause of the Constitution depends first of all upon the nature of the tax—what it is that the state has sought to tax—the all-important operating incidence of the tax *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951).

With privilege taxes, the scope of the privilege which is taxed is significant, whether it be a privilege of a purely local nature, *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), or a privilege of conducting the entire operations of business, *Fisher's Blend Station* v. *Tax Commission*, 297

U. S. 650 (1936). The decisions of this Court in *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944), on which the Court of Appeals relied, dealt with an Indiana tax which was held to be "a privilege tax upon the receipt of gross income," *Adams Mfg. Co.* v. *Storen, supra*, a local transaction separate from interstate commerce.

One type of tax may be unconstitutional and another type not, in a particular factual situation. *New Jersey Ins. Co.* v. *Div. of Tax Appeals*, 338 U. S. 665 (1950); *Werner Machine Co.* v. *Director of Div. of Taxation*, 350 U. S. 492 (1956); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944); *General Trading Co.* v. *Tax Comm'n*, 322 U. S. 335 (1944).

Contrary to the principles laid down by the above decisions of this Court, the Court of Appeals here held that appellant's contention "that the *Wood* and *Harvester* cases are not applicable because they deal with a different type of tax is without merit." (Appendix A, *infra*, p. 16.) Although the court recognized that the validity of a tax under the Commerce Clause should be determined by its practical operation and effect rather than descriptive labels, it found similarity between the Indiana and New York City laws merely in the words employed. It failed to find and distinguish the different privileges which each made the subject of the tax.

The Court of Appeals held "here, also, it is the local transaction, plainly separate and distinct from the transportation which is interstate commerce, that is made the taxable event." In other words, the New York City business tax is imposed on a local transaction separated from commerce. This holding of the Court of Appeals is in conflict with its previous decisions in which it was held that the New York City business tax is "a tax for the privilege of doing business within the City of New York. It is not an income tax, an ad valorem property tax nor is it a tax in lieu of other taxes for the use of facilities within the

City." *Matter of United Air Lines* v. *Joseph*, 282 App. Div. 48 (1953), *aff'd no opinion*, 307 N. Y. 762 (1954); *United Piece Dye Works* v. *Joseph*, 282 App. Div. 60, *aff'd without opinion*, 307 N. Y. 780 (1954), *cert. denied*, 348 U. S. 916 (1955). The Court of Appeals decision is also in conflict with the decision of this Court in *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422 (1947), *affirming* 294 N. Y. 906. In *Carter & Weekes* this Court distinguished this New York City tax from those taxes where the taxable event was a local activity or incident disjoined from commerce. Among the cases distinguished by this Court was the decision in *Wood Preserving* on which the Court of Appeals here relied. This Court treated this New York City tax as a tax on the privilege of doing business which could not be validly imposed on a stevedoring company engaged exclusively in interstate commerce.

The incidence of the tax, the subject of the tax or the event or activity upon which the liability for the tax is conditioned, referred to in decisions of this Court, is fixed by the legislature and does not vary from case to case. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 587-8 (1937).

The method of statutory construction apparently employed by the Court of Appeals is novel in that the subject or incidence of the tax is varied from case to case to avoid conflict with the Federal Constitution. In *Carter & Weekes, supra; United Air Lines, supra;* and *United Piece Dye Works, supra,* this New York City tax was held to be a tax upon the privilege of doing business, a type of tax held to be a forbidden regulation as applied to interstate commerce. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33, 48 (1940). In *Matter of New Yorker Magazine* v. *Gerosa*, 3 N. Y. 2d 362 (1957), appeal dismissed, 356 U. S. 399, the same tax was held to be a tax "on the New York sale of its advertising," considered a separable part of the total method of doing business and therefore not an encroachment on the free trade area protected by the Commerce Clause,

and it was held that this Court's decision in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), was controlling. In *Matter of Steinbeck* v. *Gerosa*, 4 N. Y. 2d 302 (1958), the same New York City tax was held to be merely a general tax which did not regulate, restrain or interfere with the freedom of the press. In this case the Court of Appeals held (Appendix A, *infra*, pp. 15-16) "*Department of Treasury* v. *Wood Corp.* (313 U. S. 62) and *Harvester Co.* v. *Department of Treasury* (322 U. S. 340) are indistinguishable from the case before us. * * * Here, too, the taxpayer delivered the goods sold to the purchaser within the taxing jurisdiction and it was the purchaser who transported them to another state; here, also, it is the local transaction, plainly separate and distinct from the transportation which is interstate commerce, that is made the taxable event." Therefore the tax did not infringe the Commerce Clause.

In the case at bar the Court of Appeals appears not to have been concerned by its earlier decisions as to the nature of this tax in *Carter & Weekes, supra; United Air Lines, supra;* and *United Piece Dye Works, supra*, cited to it by appellant, nor to have considered reversal or distinction thereof. Appellant's argument based on these earlier decisions was summarily disposed of as "neither meaningful nor consequential." The New York City law here in question cannot, it is submitted, reasonably be interpreted in one case to impose a tax on business, the entire operations including commerce and, in another case, a tax limited to a local event disjoined from commerce.

The effect of the decision of the Court of Appeals of the State of New York in this case contains a threat to the freedom from regulation of interstate commerce in New York City, one of the greatest commercial and transport centers in the world, far beyond the significance of the tax involved in this case. It amounts practically to a repeal of the Commerce Clause of the Constitution. This decision and the

other decisions of the Court of Appeals cited above stand for the proposition that if a statute imposing one kind of tax could under the Commerce Clause or other clauses of the Constitution be validly imposed under certain circumstances, then another statute imposing a different kind of tax would be valid under similar circumstances as long as there is a certain similarity in the words used in the two statutes.

Since a Federal right under the Commerce Clause is involved, this Court should review and itself determine the true nature and effect of this New York City tax which by the terms of the law and the regulations and prior decisions is a tax on the privilege of doing business. *Railway Express Agency* v. *Virginia*, 347 U. S. 359 (1954); *Society for Savings* v. *Bowers*, 349 U. S. 143 (1955); *New Jersey Ins. Co.* v. *Div. of Tax Appeals, supra.* As here applied to the unapportioned gross receipts of sales to customers in states outside New York, the New York City General Business Tax Law subjects such interstate commerce to the danger of multiple taxation and regulates such commerce in violation of the Commerce Clause of the Federal Constitution. *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434 (1939); *McGoldrick* v. *Berwind-White Co., supra.* Any of the states in which appellant's distributors were located and to which its commerce extended could without too much difficulty find a local event or activity upon which to levy a similar tax.

This Court now has before it the *Minnesota* v. *Northwestern States Portland Cement Co.*, Docket No. 12, October 1958, Term, 250 Minn. 32, 84 N. W. 2d 373, and *Stockham Valves & Fittings, Inc.* v. *Williams*, Docket No. 33, 101 S. E. 2d 197, cases which involve the effect under the Commerce Clause of the Constitution of state taxes imposed on net income as distinguished from a tax on the privilege of doing business measured by net income. We urge that this Court take jurisdiction in the case at bar and permit appellant to have the benefit of this Court's disposition of those cases.

Conclusion

It is respectfully submitted that the decision below is in conflict with decisions of this Court; that the Federal questions presented are substantial and require plenary consideration by this Court.

Respectfully submitted,

RUSSELL D. MORRILL,
Attorney for Appellant.

FRANCIS L. CASEY,
Of Counsel.

November 1958.

APPENDIX A

1. Opinion of the Court of Appeals

In the Matter of

F. & M. SCHAEFER BREWING COMPANY,
Appellant,

against

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Respondent.

Decided June 25, 1958.

FULD, J. Whether the City of New York may tax receipts from sales by a local concern to its out-of-state customers where delivery of the goods sold was made in New York, is the question for decision.

The taxpayer, the F. & M. Schaefer Brewing Company, is a domestic corporation engaged in operating a brewery in Brooklyn. It sells its beer to retailers in the metropolitan area and also to wholesale distributors in New York and in neighboring states. Each of these distributors is an independent business organization, selling Schaefer beer as well as the products of other breweries.

The sales, made to the out-of-state distributors (located in New England, Pennsylvania and New Jersey), were handled exactly as were those made to customers doing business in New York. The customer's truck would be loaded at the brewery in Brooklyn with the beer ordered and, after the load had been checked by the driver and a

Schaefer employee, the truck would be "sealed" and driven to the distributor's place of business.

The trucking arrangements entered into by the different distributors varied; some owned their own trucks or leased them, while others used contract motor carriers or utilized motor vehicle common carriers. Whatever the arrangement, however, the trucker taking delivery of the beer was selected by the distributor and had no connection with the brewery. No employee or representative of Schaefer handled the beer, or accompanied it, once it left the brewery and it assumed no responsibility for the beer from that time on.

On its New York City business tax return—imposed on gross "receipts" for "the privilege of carrying on * * * business" within the city (Administrative Code of City of New York, § B46-2.0, subd. a)—Schaefer reported its sales to out-of-state distributors as receipts from interstate commerce and based the tax paid solely on revenue derived from sales to those of its customers doing business in New York. The Comptroller of the City of New York, however, ruled that, since the customer took delivery in the city, the transaction was local and intrastate and the moneys received taxable. Including these receipts in computing the amount of tax due, the Comptroller assessed a deficiency for the taxable years 1948 through 1951 of over $43,000, which Schaefer paid under protest.

Following formal hearings, the Comptroller, deciding that the tax should be imposed upon all receipts, including those from sales to distributors doing business in other states, except where delivery for the out-of-state customer was made to a common carrier (Business Tax Regulations, art. 209; Rules and Regulations of New York City Agencies, 1938-1946, pp. 77-78), issued a "final determination" resulting in a refund of some $7,300. The Appellate Division unanimously confirmed that determination and the taxpayer, urging that the tax constituted "a discriminatory

burden on interstate commerce" in violation of the Commerce Clause of the Federal Constitution, appeals to this court as of right.

A sale of goods in which delivery is taken by the purchaser within the seller's state is a local transaction which is taxable; "neither the Commerce Clause nor the Fourteenth Amendment", the Supreme Court has said, "prevents the imposition of the tax on receipts from an intrastate transaction even though the total activities from which the local transaction derives may have incidental interstate attributes." (*Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 344, 345-346; see, also, *Department of Treasury* v. *Wood Corp.*, 313 U. S. 62, 67-68; *Indiana Dept. of State Revenue* v. *Bendix Aviation Corp.*, 237 Ind. 98, appeal dismissed 355 U. S. 607.) And it is immaterial "that the goods are to be transported out of [the taxing state] immediately on delivery", for the "consummation of the transaction was an event within [the taxing state] which gave it authority to levy the tax on the gross receipts from the sales" (322 U S. 345, 348).

Department of Treasury v. *Wood Corp.* (313 U. S. 62) and *Harvester Co.* v. *Department of Treasury* (322 U. S. 340) are indistinguishable from the case before us. In the first, a company, incorporated in Delaware and having its principal place of business in Pennsylvania, contracted to sell a quantity of railroad ties to the Baltimore & Ohio Railroad. The ties, produced by an Indiana manufacturer, were delivered to the railroad on board its cars in Indiana for shipment out of the state. Marking as significant the facts showing the completed delivery to the railroad company in Indiana, the Supreme Court declared that that state, "in taxing the receipts from these local transactions", did not exceed "its constitutional authority by taxing interstate commerce or discriminating against it" (*Department of Treasury* v. *Wood Corp.*, 313 U. S., at p. 68). And in the *Harvester* case, "sales by an Indiana seller of Indiana goods to an out-of-state buyer who comes to

Indiana, takes delivery there and transports the goods to another State" were held subject to the Indiana "tax upon the receipt of gross income" (322 U. S., at p. 345). Here, too, the taxpayer delivered the goods sold to the purchaser within the taxing jurisdiction and it was the purchaser who transported them to another state; here, also, it is the local transaction, plainly separate and distinct from the transportation which is interstate commerce, that is made the taxable event.

The petitioner's contention that the *Wood* and *Harvester* cases are not applicable because they deal with a different type of tax is without merit. In purpose and in language, the similarity between the Indiana tax there involved and the New York City tax with which we are concerned could hardly be more complete. The Indiana statute, upheld by the Supreme Court in the *Wood* and *Harvester* cases, imposes a tax upon "the gross receipts • • • received from trades, businesses, or commerce" (Indiana Stat. Ann. [Burns, 1951, Vol. 11, pt. 2], § 64-2601, subd. [m]) and the New York City law, closely resembling the other, imposes a tax upon "all receipts received • • • from • • • trade, business or commercial activity" (Administrative Code, § B46-2.0, subd. a). That the latter measure is further described as a tax on "the privilege of carrying on business"—the sole prop for the petitioner's point—is neither meaningful nor consequential. As a matter of fact, both the Supreme Court of the United States and the Indiana Supreme Court have also denominated the Indiana tax "a privilege tax" (*Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345, *supra*; *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; *Miles* v. *Department of Treasury*, 209 Ind. 172, 188, appeal dismissed 298 U. S. 640), a clear indication that the validity of a tax, or of the statute imposing one, depends on substance, not labels.

The argument that the present tax has been improperly treated as a "sales tax" rather than a "privilege tax," is purely superficial. New York City's power to tax the

receipts received from these transactions is certainly not affected by the name ascribed to the tax. (See *Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345-346, *supra;* see, also, Powell, New Light on Gross Receipts Taxes, 53 Harv. L. Rev. 909, 929-930.) "Indeed," wrote the Supreme Court in the *Harvester Co.* case, "if we are to remain concerned with the practical operation of these state taxes rather than with their descriptive labels (*Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 363), we must acknowledge that the [New York City] sales tax sustained in the *Berwind-White* case [309 U. S. 33] 'was, in form, imposed upon the gross receipts from an interstate sale' " and that " 'local activities or privileges' • • • are as adequate to support [the Indiana gross receipts] tax as they would be to support a sales tax" (322 U. S., at pp. 346, 349).

The order appealed from should be affirmed, with costs.

Chief Judge Conway and Judges Desmond, Dye, Froessel, Van Voorhis and Burke concur.

Order affirmed.

2. Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of June in the year of our Lord one thousand nine hundred and fifty-eight, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, Presiding

RAYMOND J. CANNON, Clerk

REMITTITUR June 25, 1958.

2. Judgment of the Court of Appeals

No. 107

In the Matter of the Application of the F. & M. Schaefer Brewing Company,

Appellant,

vs.

Lawrence E. Gerosa, as Comptroller of the City of New York,

Respondent,

for an Order &c.

Be It Remembered, That on the 26th day of March in the year of our Lord one thousand nine hundred and fifty-eight, The F. & M. Schaefer Brewing Company, the appellant—in this cause, came here unto the Court of Appeals, by White & Case, its attorneys, and filed in the Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Lawrence E. Gerosa, as Comptroller of the City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Peter Campbell Brown, his attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Francis L. Casey, of counsel for the appellant—, and by Mr. Morris L. Heath, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Di-

vision of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals of the
State of New York

COURT OF APPEALS, CLERK'S OFFICE,

Albany, June 25, 1958.

[SEAL]

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
Clerk:

APPENDIX B

Statutes and Regulations Involved

General City Law, Article 2-B—General Business and Financial Tax Authorization

"§ 24-a. Certain cities authorized to impose taxes on certain businesses

"Notwithstanding any other provisions of law to the contrary, any city having a population of one million or more, acting through its local legislative body, shall have power to adopt and amend local laws imposing in any such city a tax upon persons carrying on or exercising for gain or profit within such city, any trade, business, profession, vocation or commercial activity, other than a financial business, or making sales within such city, measured by the gross receipts from such activities carried on or sales made within the city, * * *. Every such local law in terms shall be, substantially, as follows:"

* * *

"§ 2. *Imposition of tax.*—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial business, or of making sales within such city, during each year, or any part thereof, commencing with July first of the year in which this local law shall take effect, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during each calendar year commencing with the calendar year during which this local law shall take effect, * * *.

New York City Administrative Code, as amended by Local Laws No. 44 of 1948, Local Laws No. 72 of 1950 and Local Laws No. 76 of 1952.

"§ B46-2.0. *Imposition of tax.*—a. For the privilege of carrying on or exercising for gain or profit within the city any trade, business, profession, vocation or commercial activity other than a financial

business, or of making sales within such city, for each of the periods of one year, or any part thereof, commencing with July first, nineteen hundred forty-eight, and for each year thereafter commencing July first, every person shall pay an excise tax which shall be equal to one-fifth of one per centum upon all receipts received in and/or allocable to the city from such profession, vocation, trade, business or commercial activity exercised or carried on by him during the calendar year in which each such period of one year shall commence, * * *.

* * *

Rules and Regulations of New York City Agencies, 1938-1946, pp. 60-61, 62, 77-78.

Rules and Regulations Relating to the General Business and Financial Tax

"Article 101.—The General Business and Financial Tax (commonly called the 'Business Tax' or 'Gross Receipts Tax') has been in effect since May 22, 1934, by virtue of local laws enacted from year to year. The tax is imposed for the *privilege* of carrying on or exercising for gain or profit within the City of New York any trade, business, profession, vocation or commercial activity, or of making sales * * * within such city, during a specific 'privilege period,' or any part thereof, and is based upon the gross receipts * * * for a specified 'basic period' as set forth in the respective local laws."

* * *

"Article 104.—The General Business and Financial Tax is imposed for the privilege of conducting business or any professional or commercial activity within the City of New York during a specific privilege period, or any part thereof. Under the current local law (and many of the preceding ones), the privilege period commences on July 1st of the calendar year and ends on the following June 30th.

"The tax for any particular privilege period is computed upon the gross receipts * * *. The levy is imposed for the privilege of doing business during the privilege period, or any part thereof, and the

gross receipts or gross income for the basic period, as the case may be, are used as the means of computing the amount of tax due thereunder."

• • •

"Article 209.—Receipts from transactions involving interstate commerce are not exempt from tax but are to be included in its measure either in their entirety or upon an allocated basis as provided in subsequent articles of these regulations.

"Transactions will be deemed to involve interstate commerce only when they directly involve the sale, exchange or transportation of commodities between the states; the transportation of passengers between the states; or the transmission of intelligence or communications between the states. The citizenship or residence of the parties to the transaction is of no significance. Where a sales transaction is involved, it is of no importance in which state title to the goods passes or whether the goods are shipped f.o.b. one state or another.

"Interstate commerce is not deemed to be involved in sales made by a New York City vendor to customers located outside the State of New York where the property is delivered directly to the purchaser or his agent within the State of New York, notwithstanding the fact that the purchaser or his agent intends to, and later does, transport the property to a point outside the State. However, such sales will be considered as having been made in interstate commerce when the New York City vendor, as a necessary incident to the contract of sale, agrees to, and does, deliver the goods to the purchaser at a point outside the State of New York, or delivers the goods to a common carrier consigned to the purchaser at a point outside the State."

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 526

THE F. & M. SCHAEFER BREWING CO.,

Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee.

Appeal from Final Order of the New York Court of Appeals

MOTION TO DISMISS APPEAL

CHARLES H. TENNEY,
STANLEY BUCHSBAUM,
Office & P. O. Address,
Municipal Building,
New York 7, N. Y.,
Counsel for Appellee.

MORRIS L. HEATH,
Of Counsel.

Adams Press Corp., 82 Beekman Street, N. Y.—Beekman 3-1050-51

TABLE OF CONTENTS

	PAGE
PRELIMINARY STATEMENT	1
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT OF THE CASE	2
FACTS	3
I	3
II	4
III	5
IV	6
V	6
ARGUMENT—The challenge to the constitutionality of the New York City General Business and Financial Tax as applied to appellant's receipts from sales to out-of-state distributors, where delivery was taken in the City of New York, does not present a substantial federal question	7
I	7
II	10
III	11
IV	12
CONCLUSION	13

Cases Cited

PAGE

Crew Levick Co. v. Pennsylvania, 245 U. S. 292 (1917) 11

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921) 12

Department of Treasury v. Wood Preserving Corp., 313 U. S. 62 (1941) 3, 7-9, 11, 12

Furst v. Brewster, 282 U. S. 493 (1931) 12

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196 (1885) 11

Indiana Dept. of State Revenue v. Bendix Aviation Corp., —— Ind. ——, 143 N. E. 2d 91 (1957), appeal dismissed, 355 U. S. 607 (1958) 7, 10

International Harvester Co. v. Department of Treasury, 322 U. S. 340 (1944) 3, 7-10, 12, 13

International Textbook Co. v. Pigg, 217 U. S. 91 (1910) 12

J. D. Adams Mfg. Co. v. Storen, 304 U. S. 307 10

Kelley v. Rhoads, 188 U. S. 1 (1903) 11

McGoldrick v. Berwind-White Co., 309 U. S. 33 (1940) 9

Miles v. Department of Treasury, 209 Ind. 172, 199 N. E. 372, appeal dismissed, 298 U. S. 640 10

Minnesota v. Blasius, 290 U. S. 1 (1933) 12

Richfield Oil Corp. v. State Board, 329 U. S. 69 (1946) 11, 12

Sonneborn Bros. v. Cureton, 262 U. S. 506 (1923) ... 12

Swift & Co. v. United States, 196 U. S. 375 (1905) ... 12

United States v. Simpson, 252 U. S. 465 (1920) 12

Statute Cited

PAGE

Civil Practice Act of the State of New York:

Article 78 ..... 2, 3

Rule Cited

Comptroller's Regulations:

Article 209 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 526

THE F. & M. SCHAEFER BREWING CO.,

Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,

Appellee.

Appeal from Final Order of the New York Court of Appeals

MOTION TO DISMISS APPEAL

Preliminary Statement

The appellant has appealed from a final order of the Court of Appeals of the State of New York dated June 25, 1958, unanimously affirming an order of the Appellate Division of the Supreme Court of that State.

The opinion of the Court of Appeals is officially reported in 4 N. Y. 2d 423 and is set forth in Appendix A of the appellant's statement as to jurisdiction. The decision of

the Appellate Division is officially reported in 3 App. Div. 2d 898.

By this appeal, the appellant challenges the constitutional validity of the New York City General Business and Financial Tax, as imposed on it for the privilege of carrying on business within the City, to the extent that the tax is measured by appellant's gross receipts from sales to out-of-state customers where the customers took delivery within the City of New York. It contends that the tax, to the extent that it is measured by such receipts, is repugnant to the Commerce Clause.

Appellee moves to dismiss the appeal on the ground that it does not present a substantial federal question.

Statutes and Regulations Involved

The statutes imposing the tax, and the regulations of the Comptroller of the City of New York issued thereunder, are set forth in Appendix B of the appellant's statement as to jurisdiction.

Statement of the Case

This proceeding was brought under the provisions of Article 78 of the Civil Practice Act of the State of New York to annul a determination of the Comptroller of the City of New York assessing additional general business taxes for the period between July 1, 1948 and June 30, 1952, in the total principal amount of $28,019.56.

The determination under review was made as the result of a hearing held by the Comptroller of the City of New York at which evidence was taken. Appellant appeared, and was represented by counsel, at such hearing.

Under the practice in New York the administrative hearing constitutes the trial of the issues in the case (Civil

Practice Act, Article 78). The determination issued in this case as a result of the hearing was first reviewed by the Appellate Division, First Department, which unanimously confirmed it. Upon appeal by appellant to the Court of Appeals of the State of New York that Court unanimously affirmed.

The Appellate Division wrote no opinion. The Court of Appeals wrote an opinion holding the case to be indistinguishable from *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944).

Facts

I

Appellant is a New York corporation with its principal place of business and brewery at 430 Kent Avenue, Brooklyn, New York (fol. 17). It does a substantial business with customers in the City and State of New York and is admittedly subject to the New York City business tax. The present controversy relates solely to a portion of its sales; to wit, those made to out-of-state distributors where delivery is made at the local brewery (fols. 68-69, 250-263, Txp's Exhs. 1, 20, City's Exh. B).

Appellant sells its beer directly to retailers, as well as to wholesale distributors, which in turn sell to retailers (fols. 91-92). Such distributors are assigned territories by appellant in which they are authorized to sell Schaefer beer, coinciding with the territory granted to the distributor by the state liquor authorities in the state where the distributor is licensed to sell beer (fols. 95, 352-355, 396-397). None of the out-of-state distributors here in question are licensed to sell beer in the State of New York (fols. 246-247, 346-347, 399, 406).

The distributors have no corporate affiliation with appellant, and are not limited to distributing Schaefer beer alone, but distribute the beer of other breweries as well (fols. 232-233, 353). The distributors acquire the beer from appellant by outright purchase, not consignment (fol. 233). Most of the sales to distributors are on open account, terms net, but there are also some C. O. D. sales (fol. 323, Txp's Exh. 24, p. 151).

II

The sales and deliveries to New York State distributors, the receipts from which are admittedly taxable in full, are handled in exactly the same way as the deliveries to the out-of-state distributors here in issue (fols. 68-69, 264-266).

The sales in question were made to distributors in eight states (Pennsylvania, New Jersey and the six New England States) (fols. 532-533). In every case the beer was picked up at appellant's brewery in Brooklyn by vehicles and drivers selected by the distributors (fols. 96, 228-229, 239-241, 475-480). Appellant had nothing to do with selecting the method of transportation (fols. 196, 362, 407-408). The distributors decided what method of transportation to use and the drivers and carriers admittedly represented and acted for the distributors, not for appellant (fols. 239-240, 244-245, 251, 343-344, 363, 388-390).

So far as appellant was concerned its part of the transaction was finished when the truck supplied by the distributor was loaded at the brewery in Brooklyn (fols. 185-186, 198-201). Appellant sent no representative along with the truck, did not reserve title to the beer during transit, and had no control over the beer after delivering it to the truck (fols. 200, 203, 206). Appellant carried no insurance against loss of the beer during transit, all risk of loss being on the distributors or their carriers (fols. 359-362, 392-393).

III

The general practice was for a distributor to put in an order in advance by writing, telegraphing or calling the brewery and setting a date for delivery (fols. 92-93). Appellant's credit department would review the order and, if it was approved, would indicate whether it was to be a cash or credit transaction (fols. 171-175, 324-326, 329, 335-336). The day before the distributor was to call at the brewery and pick up the beer appellant's traffic department would prepare four copies of a document called a "Delivery Ticket and Invoice" (one document) showing, among other things, the number of units of each description ordered by the distributor (fols. 101-104, 176, 186, Txp's Exh. 24, p. 150).

When the distributor's driver arrived at the brewery with his vehicle to pick up the beer, he would show a pick-up order to appellant's dispatcher and receive from that individual all four copies of the aforesaid delivery ticket (fols. 101-103). If appellant's credit department had indicated "C. O. D." on the ticket the driver would make the payment prior to picking up the delivery ticket forms (fols. 321-322, 327-328). In all cases, after receiving the papers the driver would take them to the loading dock or platform at the brewery, where any empty cases were first unloaded, and the full cases of beer were loaded on the truck by appellant's employees (fols. 179-181).

Prior to the loading, the driver of the truck would hand the pick-up order and the four copies of the delivery ticket to one of appellant's employees called a checker (fols. 101-103). The checker supervised the actual loading of the truck, keeping a tally, with the driver, of "exactly what is delivered" (fols. 94, 182-183). When the loading was completed, the checker entered on the delivery ticket the number of units delivered; he and the driver signed the delivery tickets; the driver took one copy; and the driver departed with the truckload of beer (fols. 103-104, 184-188).

IV

All the witnesses who testified on the subject stated that the delivery of the beer was made at the loading platform of appellant's brewery in Brooklyn (fols. 185-186, 189-190, 198-204, 234, 251, 255, 268-269, 290-291, 312). Its Assistant Controller designated this loading platform as the "point on the premises of The F. & M. Schaefer Brewing Company at which beer is transferred from the possession of The F. & M. Schaefer Brewing Company to the customer or his agent" (fols. 203, 316-317).

V

The distributors picked up the beer in a number of ways. Some used their own vehicles, or vehicles leased to them, and operated by their own employees (fols. 429-433). Others used motor vehicle contract carriers and still others used motor vehicle common carriers (fols. 433-434). The precise amount of sales falling in each of these categories was established at the hearing on the basis of questionnaires which appellant sent to the distributors (fols. 435-440, Txp's Exhs. 39 and 40).

Based on this data, the Comptroller in the final determination eliminated the additional tax on receipts from sales where the distributors used common carriers to pick up the beer (fols. 529-534). This allowance was made in accordance with the last paragraph of Article 209 of the Comptroller's Regulations, quoted at page 23 of the appellant's statement as to jurisdiction.

Thus the final determination treats all appellant's receipts from sales to out-of-state distributors, where the beer was picked up at its brewery in Brooklyn, as fully taxable, except that where such a distributor used a common carrier the receipt is treated as allocable.

ARGUMENT

The challenge to the constitutionality of the New York City General Business and Financial Tax as applied to appellant's receipts from sales to out-of-state distributors, where delivery was taken in the City of New York, does not present a substantial federal question.

This case is indistinguishable from *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944).

The issue is not novel or unsettled, and the decision of the Court of Appeals of the State of New York is not in conflict with any decision of this Court. In fact it is expressly and wholly based on the aforesaid two decisions of this Court, together with the recent decision in *Indiana Dept. of State Revenue* v. *Bendix Aviation Corp.*, Ind. , 143 N. E. 2d 91 (1957), appeal dismissed 355 U. S. 607 (1958).

I

This Court has established that, for tax purposes, a sale of goods in which delivery is taken by the purchaser within the state of the seller is a local or intrastate transaction, the receipts from which are taxable in full by the state of the seller. The sale is not transformed into an interstate transaction simply because the parties intend that the purchaser will transport the goods out of the state after taking delivery of them or because the purchaser does in fact transport them out of the state. For purposes of a tax on the gross receipts of the seller, such transportation by the purchaser is deemed separate and distinct from the sale.

In *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), the transactions in question were sales of untreated railroad ties by the Wood Preserving Corporation to the Baltimore and Ohio Railroad Company. The contracts called for the ties to be delivered f. o. b. cars on the purchaser's railroad tracks at loading points in Indiana for transportation to a creosoting plant in Ohio.

The practice was for a representative of the purchaser to inspect and accept the ties at the loading points in Indiana. The seller would then load them upon the purchaser's cars consigned to the purchaser at the Ohio plant. The railroad company (purchaser) then carried the ties to Ohio at its own cost.

The seller, Wood Preserving Corporation, was held to be subject to the Indiana gross income tax on its receipts from these sales, without apportionment of any kind, the Court saying (313 U. S., at p. 68):

> "These were local transactions—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment."

That the parties intended the ties to be transported out of the state immediately upon their sale and delivery to the railroad company appears from the fact that at the time of the sale the railroad company was under contract to deliver the ties so purchased to a plant in Ohio operated by a subsidiary of the seller for creosoting treatment.

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340 (1944), involved sales by Indiana branches of the Harvester Company to purchasers (dealers and users) located outside of Indiana, under contracts calling for the

purchasers to pick up the articles at the Indiana branch. The opinion designates these as "Class D" sales. The tax was disputed on the ground that the purchasers transported the articles out of Indiana immediately upon taking delivery.

In sustaining the Indiana gross income tax on the Harvester Company's receipts from these sales the Court cited and followed the *Wood Preserving* case. It referred to *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940), and said (322 U. S., at pp. 345-346):

> "Under the principle of that case, a buyer who accepted delivery in New York would not be exempt from the sales tax because he came from without the State and intended to return to his home with the goods. The present tax, to be sure, is on the seller. But in each a local transaction is made the taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce."

The *Harvester* case establishes that such a sale is taxable even though the subsequent removal of the goods from the state by the purchaser is certain (322 U. S., at p. 345). Appellant in the present case contends that the beer it sold was certain to leave the state because the distributors purchasing it had no license to sell it in this state. Essentially the same contention was made and rejected in the *Harvester* case.

Most of the sales involved in this phase of the *Harvester* case were made by Indiana branches to retail dealers who had been assigned specific selling territories outside of Indiana and who were not permitted, under their contracts with the Harvester Company, to make sales in Indiana of Harvester Company products (322 U. S. 340; Record at

pp. 27-30, 32, 45, 55, 58-59, 68-69). The goods purchased by such dealers in Indiana could only be resold outside of Indiana, just as the beer purchased by appellant's distributors could only be resold outside of New York.

The tax in the present case is further sustained by the recent case of *Indiana Department of State Revenue* v. *Bendix Aviation Corp.*, Ind. , 143 N. E. 2d 91 (1957), dismissed for want of a substantial federal question, 355 U. S. 607 (1958). In that case the Indiana gross income tax was held valid as applied to a company's receipts from sales of articles manufactured by it in Indiana, where the articles were delivered to the purchaser's carrier at the taxpayer's Indiana plant, consigned to points outside of the state.

II

The New York Court of Appeals stated that "[in] purpose and in language" the similarity between the Indiana tax, involved in the foregoing cases, and the New York City tax "could hardly be more complete" (4 N. Y. 2d, at p. 428). It noted that the Indiana tax was imposed on "the gross receipts * * * received from trades, businesses, or commerce," whereas the New York City tax is on "all receipts received * * * from * * * trade, business or commercial activity" (*id.*).

The New York Court of Appeals further held that the taxes were not different simply because the New York City tax contains a provision describing it as a tax on "the privilege of carrying on business", particularly since, as it noted (*id.*), this Court, and the Indiana state courts, had described the Indiana tax as "a privilege tax" in *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340, 345; *J. D. Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 311; and *Miles* v. *Department of Treasury*, 209 Ind. 172, 188, 199 N. E. 372, 379, appeal dismissed 298 U. S. 640.

The appellant, at pages 8-10 of its statement as to jurisdiction, asserts that the New York Court of Appeals in this case adopted a new construction with regard to the nature of the New York City tax. There is no basis for this view. The Court of Appeals simply held that the New York City tax was the same as the Indiana tax in that both are imposed on persons engaged in business in their respective jurisdictions, for the privilege of carrying on business, measured by the gross receipts from such business. There is no ground for differentiating the taxes on the basis of their purpose or terms.

III

The nine cases on which appellant appears principally to rely (statement as to jurisdiction, p. 6) have little pertinency.

Four are tax cases. *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292 (1917); *Gloucester Ferry Co.* v. *Pennsylvania*, 114 U. S. 196 (1885); *Kelley* v. *Rhoads*, 188 U. S. 1 (1903); *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69 (1946).

In the *Crew Levick* case a tax on gross receipts was held invalid as applied to receipts of a wholesale merchant from sales to customers in foreign countries, where the goods were "shipped direct by plaintiff in error from its warehouse in Pennsylvania to its customers in the foreign countries" (p. 293). The present plaintiff made no such out-of-state shipments.

In the *Gloucester Ferry* and *Rhoads* cases taxes were held invalid as applied, respectively, to an interstate ferry and to sheep moving in interstate commerce. The factual situations were totally unlike the facts in the present case.

In the *Richfield Oil* case a state tax was held invalid under the Import-Export Clause as applied to a sale of oil for shipment abroad. This Court held that the *Wood Pre-*

serving and *Harvester* cases did not apply because they involved the Commerce Clause, whereas the *Richfield Oil* case involved the Import-Export Clause, and "the limitations of one cannot be read into the other" (329 U. S., at pp. 74-76).

Three of the cases relied on by appellant are state qualification cases. *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921); and *Furst* v. *Brewster*, 282 U. S. 493 (1931). Such cases have no application in a tax case since they are "not concerned with the power to tax" [*Sonneborn Bros.* v. *Cureton*, 262 U. S. 506, 514 (1923)].

That these cases have no bearing in the present case is borne out by the fact that the *Pigg* and *Dahnke-Walker* cases were unsuccessfully relied on by the taxpayer in the *Wood Preserving case* (313 U. S. 62, Respondent's Brief, pp. 68-77), and that the *Dahnke-Walker* case was cited without success by the taxpayer in the *Harvester* case (322 U. S. 340, Appellant's Brief, pp. 25-27).

One of the remaining two cases relied on by appellant (*Swift & Co.* v. *United States*, 196 U. S. 375 [1905]), involved federal regulation of a stockyard. It was later aligned with *Dahnke-Walker*, and other regulation cases, as inapplicable in tax cases. *Minnesota* v. *Blasius*, 290 U. S. 1, 7-8 (1933).

The ninth case cited by the appellant (*United States* v. *Simpson*, 252 U. S. 465 [1920]), was a decision sustaining the validity of an indictment of an individual under a federal prohibition act for transporting five quarts of whiskey for his own use across state lines. Such a case has no relevancy here.

IV

Appellant's assertion that the tax subjects it to the risk of multiple taxation is groundless. The tax is imposed on

a transaction of sale in which the agreement to sell was made in the City of New York and the delivery also took place there. No jurisdiction outside of the State of New York has the power to impose a similar tax on such a transaction.

The identical contention was made and rejected in *International Harvester Co.* v. *Department of Revenue*, 322 U. S. 340, 348-349 (1944).

CONCLUSION

The appeal to this Court from the order of the Court of Appeals of the State of New York should be dismissed.

December 4, 1958.

Respectfully submitted,

CHARLES H. TENNEY,
STANLEY BUCHSBAUM,
Counsel for Appellee.

MORRIS L. HEATH,
Of Counsel.

FILE COPY

Supreme Court, U.S.
FILED
DEC 22 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 526

THE F. & M. SCHAEFER BREWING CO.,
Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

RUSSELL D. MORRELL,
Attorney for Appellant.

FRANCIS L. CASEY,
Of Counsel.

December 1958.

INDEX

PAGE

ARGUMENT 2

I. The decision of the Court of Appeals of New York is in direct conflict with decisions of this Court 2

(1) Conflict with decision in *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422 (1947) ... 2

(2) Conflict with decisions on interstate commerce 4

II. Danger of interference with interstate commerce is real and substantial 5

CONCLUSION 11

CITATIONS

CASES:

Adams Mfg. Co. v. *Storen*, 304 U. S. 307 (1938) ...7, 9, 10

American Mfg. Co. v. *St. Louis*, 250 U. S. 459 (1919) 6, 9, 10

Central Greyhound Lines v. *Mealey*, 334 U. S. 653 (1948) 4

Department of Treasury v. *Wood Preserving Corp.*, 313 U. S. 62 (1941) 1, 2, 3, 7, 8, 10

Freeman v. *Hewit*, 329 U. S. 249 (1946) 6

Gautier v. *Ditmar*, 204 N. Y. 20 (1912) 5

Henneford v. *Silas Mason Co.*, 300 U. S. 577 (1937) 6

PAGE

International Harvester Co. v. *Department of Treasury*, 322 U. S. 340 (1944) 1, 2, 3, 7, 10

Joseph v. *Carter & Weekes Co.*, 330 U. S. 422 (1947) 2, 3, 6

Matter of The New Yorker Magazine v. *Gerosa*, 3 N. Y. 2d 362 (1957) 7, 9

Matter of Steinbeck v. *Gerosa*, 4 N. Y. 2d 302 (1958) 6, 7

Matter of United Air Lines v. *Joseph*, 282 App. Div. 48 (1953), aff'd no opinion, 307 N. Y. 762 (1954) 6, 8

McGoldrick v. *Berwind-White Co.*, 309 U. S. 33, 48 (1940) 3, 6, 8, 10

McLeod v. *Dilworth Co.*, 322 U. S. 327 (1944) 6

Puget Sound Stevedoring Co. v. *Tax Commission*, 302 U. S. 90 (1937) 2

Richfield Oil Corp. v. *State Board*, 329 U. S. 69 (1946) 5

Southern Pacific Co. v. *Gallagher*, 306 U. S. 167 (1939) 3

Spector Motor Co. v. *McLaughlin*, 323 U. S. 101 (1944) 9

Spector Motor Service v. *O'Connor*, 340 U. S. 602 (1951) 6, 8

Superior Oil Co. v. *Mississippi*, 280 U. S. 390, 395 (1930) 4

Western Live Stock v. *Bureau of Revenue*, 303 U. S. 250 (1938) 3, 6, 7, 8, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 526

THE F. & M. SCHAEFER BREWING CO.,
Appellant,

v.

LAWRENCE E. GEROSA, as Comptroller of the City of New York,
Appellee.

APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellee moves to dismiss the appeal on the ground that it does not present a substantial Federal question. In support of his motion appellee argues that the issue is not novel or unsettled and that the decision of the Court of Appeals of the State of New York is not in conflict with any decision of this Court but is indistinguishable from and wholly based on the decisions of this Court in *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944).

ARGUMENT

I

The decision of the Court of Appeals of New York is in direct conflict with decisions of this Court.

(1)

Conflict with decision in *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422.

In *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422 (1947), this Court had before it the question of whether the New York City General Business and Financial Tax, the same tax here before the Court, as applied to the gross receipts from interstate commerce, stevedoring activities, carried on wholly within the territorial limits of the City of New York was in violation of the Commerce Clause. In that case the City argued that the holdings of this Court in *Department of Treasury* v. *Wood Preserving Corp.*, 313 U. S. 62 (1941), and *International Harvester Co.* v. *Department of Treasury*, 322 U. S. 340 (1944), among others, had in effect overruled this Court's decision in *Puget Sound Stevedoring Co.* v. *Tax Commission*, 302 U. S. 90 (1937), and that the reasons which underlay that decision no longer controlled in judicial examination of the constitutionality of state taxation of gross proceeds derived from interstate commerce. However, this Court held that the Washington State tax on the privilege of doing business measured by gross receipts involved in *Puget Sound* was "indistinguishable from that laid by New York City in this case," and reaffirmed the rule of *Puget Sound*.

It was there held that a tax on gross receipts of interstate commerce "or upon the privilege of conducting the business" of interstate commerce, measured by those gross receipts is invalid. In addition to the possibility of multiple taxation the court stated, p. 433, " 'What makes the tax in-

valid is the fact that there is interference by a State with the freedom of interstate commerce.' *Freeman* v. *Hewit, supra,* p. 256. Such a rule may in practice prohibit a tax that adds no more to the cost of commerce than a permissible use or sales tax. What lifts the rule from formalism is that it is a recognition of the effects of state legislation and its actual or probable consequences." This Court repeated at p. 432 its condemnation of taxes on the privilege of doing business as a forbidden regulation of interstate commerce set forth in *McGoldrick* v. *Berwind-White Co.,* 309 U. S. 33, 48 (1940).

The decisions in *Wood Preserving* and *Harvester* on the Indiana Gross Income Tax and in *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250 (1938); *Southern Pacific Co.* v. *Gallagher,* 306 U. S. 167 (1939), and *McGoldrick* v. *Berwind-White Co., supra,* were reviewed and reaffirmed and distinguished from the *Puget Sound* decision on the basis of the difference between the type of tax involved in those cases and the type of tax in *Puget Sound* and the New York City business tax here. The Court referring to the *Wood Preserving* group of cases stated, p. 433:

> "Though all of these cases were closely related to transportation in commerce both in time and movement, it will be noted that in each there can be distinguished a definite separation between the taxable event and the commerce itself. We have no reason to doubt the soundness of their conclusions."

The decision of the New York State Court of Appeals that the *Wood Preserving* and *Harvester* cases are indistinguishable from this case and that the Indiana tax and the New York City tax here are similar is directly contrary to the decision of this Court in *Joseph* v. *Carter & Weekes.*

(2)

Conflict with decisions on interstate commerce.

The initial specific issue raised in this case below was whether the means of transport is the sole criterion of interstate commerce where beer brewed in Brooklyn is sold to distributors located and doing business outside New York State who had the beer picked up by trucks at the brewery and transported out of New York.

Receipts from sales where the beer was transported by common carrier trucks were, in accordance with Article 209 of appellee's Regulations (p. 23, Appendix B of Statement as to Jurisdiction), determined to be from interstate commerce and allocated. Receipts from sales where transportation was by contract carriers and distributors' own trucks were determined to be from intrastate commerce and wholly taxable. Article 209 of the Regulations was admitted by appellee's counsel below to have been based on a dictum in *Superior Oil Co.* v. *Mississippi*, 280 U. S. 390, 395 (1930), where in sustaining a sales tax it was said that if the oil had been delivered by the Mississippi seller to "a common carrier" for transportation to Louisiana the sale might not be taxable. This regulation is the type of legal fiction condemned by this Court in *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653 (1948), where it was stated, p. 659, "To call commerce in fact interstate 'local commerce' because under a given set of circumstances, as in the *Lehigh Valley* case, a particular exertion of State power is not rendered invalid by the Commerce Clause is to indulge in a fiction." The decision of the Court of Appeals of the State of New York confirming this application of the regulation conflicts with decisions of this Court cited at p. 6 of the Statement as to Jurisdiction which are not distinguishable as appellee contends in his motion.

The concept of "commerce • • • among the several States" in the Constitution is the same in granting Con-

gress power to regulate as in restricting the states' powers. Therefore, the decisions of this Court which define and describe interstate commerce are of equal applicability and force whether they were rendered in cases dealing with questions of Federal jurisdiction under Congressional enactments or the states' power to tax.

Transportation by common carrier is evidentiary and significant only in determining whether transportation in interstate or foreign commerce has started at a given moment or day as when a tax is assessed on property on a set day, or in determining the certainty of a destination of goods delivered as is necessary for a sales tax. *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69 (1946). For the purposes of computing the exaction of the New York City business tax the means of transportation is of no significance because the determination of the receipts of the business and their character is based on the calendar year and after it has closed and transportation to destination has been completed. New York City Administrative Code, Section B46-2.0 and Regulations 104, Appendix B, Statement as to Jurisdiction, pp. 21-23.

The decision of the Court of Appeals in determining tax liability in this case on the basis of delivery to a particular type of carrier is therefore in conflict with the additional decisions of this Court on the nature of interstate commerce.

II

Danger of interference with interstate commerce is real and substantial.

Taxation is a legislative function, *Gautier* v. *Ditmar,* 204 N. Y. 20 (1912), and wide latitude exists for permissible state taxation. Such limitations on state taxation as exist result from long continued judicial interpretation of the general clauses of the Federal Constitution such as the Commerce Clause. Whether a state may validly make

interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so. *Freeman* v. *Hewit*, 329 U. S. 249 (1946); *McLeod* v. *Dilworth Co.*, 322 U. S. 327 (1944); *Spector Motor Service* v. *O'Connor*, 340 U. S. 602 (1951). A tax on the unapportioned gross receipts of interstate business or on the privilege of conducting such business has long been forbidden by this Court as an undue interference with interstate commerce. *Joseph* v. *Carter & Weekes, supra.* However, where the legislature has selected an event, or a transaction, or a part of a business which is local and short of commerce the subject of the tax has been upheld even though gross receipts are used as a measure and interstate commerce may be affected but not regulated. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (1940), and cases cited in footnotes, p. 47; where the taxable event was the delivery of title or possession on a sale; *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), where the privilege of manufacturing, only a part of a business, was taxed; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), where the privilege of preparing, printing and publishing, the manufacturing, of magazines distinct from circulation was taxed. Where the line is drawn in fixing the subject of the tax, is for the legislature not the courts. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577 (1937).

The legislatures of the State and the City of New York made business in its widest possible sense the subject of this tax.* *Matter of Steinbeck* v. *Gerosa*, 4 N. Y. 2d 302 (1958); *Matter of United Air Lines* v. *Joseph*, 282 App. Div. 48 (1953), aff'd no opinion, 307 N. Y. 762 (1954). The legislature also made the measure of the tax a percentage of "all the receipts * * * from such profession, vocation, trade, business or commercial activity * * *." The legislature did not make a local transaction, "a sale of goods in which delivery is taken by the purchaser within the seller's state,"

" * * any trade, business, profession, vocation or commercial activity." (Section B46-2.0, Appendix B, p. 21, Statement as to Jurisdiction.)

the taxable event. However, the legislature drew the line to encompass and reach the entire operations of business including transportation which is interstate commerce.

In *Matter of The New Yorker Magazine* v. *Gerosa*, 3 N. Y. 2d 362 (1957), appeal dismissed for want of a substantial Federal question (356 U. S. 399), the Court of Appeals of the State of New York, in effect, changed the legislature's boundary lines to shrink the subject of the tax to a separable part of the business. The court there said, at p. 367, "In the present case appellant, as we have seen, had its printing done outside the State but it would seem that was merely a separable part of its total method of doing business. *And the tax here is not on the printing of the magazine but on the New York sale of its advertising.*" (Emphasis supplied.) Having thus drawn in the lines the Court of Appeals held that the *Western Live Stock* decision of this Court was controlling.

In *Matter of Steinbeck, supra,* the subject of the tax was again held to be "all businesses" but it was held that the New York City tax was "a general tax" of which "the sole object is revenue notwithstanding the fact that *the tax is styled a 'privilege tax'*" and that it was not intended to regulate those covered by its provisions.

In this case the Court of Appeals of the State of New York has further constricted the legislature's boundary lines of the New York City business tax to a mere "local transaction • • • that is made the taxable event" and held that this Court's decisions in the *Wood Preserving* and *Harvester* cases, *supra,* were indistinguishable. In his motion to dismiss appellee argues, on p. 7, that the New York tax is on the sale of goods and, on p. 11, that it is the same as the Indiana tax in that "both are imposed on persons engaged in business • • • for the privilege of carrying on business, measured by the gross receipts from such business." The court below did not and could not hold that the Indiana tax was imposed on the privilege of carrying on business as this Court had held the contrary. *Adams Mfg. Co.* v. *Storen,* 304 U. S. 307, 310, 312-314 (1938).

At the present time, under the judicial interpretation of the Court of Appeals described above, the New York City Business Tax Law is four different types of tax. It is actually applied to appellant's business as two of those types. Where the beer is transported by common carrier trucks to customers outside New York the tax is treated as a tax on the privilege of doing business and the receipts are allocated in accordance with the principles laid down in *Spector Motor Service* v. *O'Connor, supra,* and *United Air Lines* v. *Joseph, supra.* Where the beer is transported by contract carriers distinguishable only by a different Interstate Commerce Commission license, or by a customer's truck, the tax is treated as a direct tax on receipts like a sales tax and the entire unallocated gross receipts are taxed under the principles of *Wood Preserving.*

Although they were not in issue for the court below, where the beer was delivered by appellant's (the seller's) own trucks to customers in metropolitan New Jersey the receipts were reported as required by appellee's regulations and taxed as allocable receipts from interstate commerce. City's Exhibit B (not printed), fols. 276-277, pp. 92-93. Under the Court of Appeals decision here the receipts from such deliveries are not taxable since the "taxable event," delivery, occurred in New Jersey. Under the *New Yorker* decision, however, applying *Western Live Stock* or *American Mfg. Co.* such receipts would be wholly taxable since the brewing—a separable local part of the business—was done in Brooklyn. In the case of an out-of-state brewer who sold and shipped beer into the city, the reverse of appellant's business, the same judicial interpretation as here could lead to a New York City business tax on the entire gross receipts on the authority of *Berwind-White, supra.*

The Court of Appeals of the State of New York in this and the other cases referred to above has decided the constitutional issues involved with variable adherence to a definition of the subject or operating incidence of the New

York City business tax contrary to *Spector Motor Co.* v. *McLaughlin*, 323 U. S. 101 (1944).

The protection from interference intended to be afforded to commerce between the states by the Constitution is set at naught if the Court of Appeals of New York be permitted to continue shifting and changing the "constitutional channel" of this New York City tax from business, to a part of a business, to a mere transaction or event in a part of a business as the facts may suggest, so that a decision of the United States Supreme Court upholding that type of tax will be found applicable.

Last year the City of New York collected revenue of $98,002,676.27 from this general business tax. Annual Report of the Comptroller of the City of New York for Fiscal Year 1957-58, p. 187.

This case should be considered along with the motion for leave to file a second petition for rehearing in *The New Yorker Magazine, Inc.* v. *Gerosa* (October 1957, Term, No. 816), now pending before the Court. In *The New Yorker* case, the Court of Appeals sustained the tax as being indistinguishable from *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), in which this Court sustained a New Mexico tax as "one for the privilege of doing a local business." 303 U. S. at 261. In the present case, the court below held that the New York City tax is completely similar to the Indiana tax, which was squarely held by this Court not to be a tax upon the privilege of the transaction of business, *Adams Mfg. Co.* v. *Storen*, 304 U. S. 307, 310 (1938), but "a tax upon gross receipts from commerce." *Id.* at 311. As a "direct unapportioned tax on gross receipts," *Freeman* v. *Hewit*, 329 U. S. 249, 257 (1946), the Indiana tax was held by this Court in *Adams Mfg. Co.* v. *Storen*, at 312-14, and in *Freeman* v. *Hewit*, *supra*, at 258, to be different from the tax "upon the privilege of manufacturing within the State," 304 U. S. at 312-13, upheld in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), the "authority * * * deci-

sive" of the *Western Live Stock* case, *supra*, 303 U. S. at 258.

The New York City tax cannot be both a tax on the privilege of doing business, the entire operations, of the type of tax in *Carter & Weekes*, and a tax on the privilege of doing a local business of the type in *American Mfg. Co.* v. *St. Louis*, 250 U. S. 459 (1919), and *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250 (1938), and also a direct tax on gross receipts like the Indiana tax in the *Adams* and *Freeman* cases or in the *Wood Preserving* and *Harvester* cases which were based on *Berwind-White*, *supra*, the New York City sales tax case.

The Court of Appeals should not be permitted to change its position from case to case as to the nature of the New York City tax involved, sustaining one as a tax on doing a local part of a business (as in *The New Yorker* case) and another as a tax directly on receipts the same as a sales tax (as in the present case).

The City's discussion of the opinion below and the Indiana tax is incorrect in several respects. This Court did not hold in *Adams Mfg. Co.* v. *Storen* that the Indiana tax is a tax on the privilege of doing business, as the City asserts at p. 10 of its motion. On the contrary, this Court held in the *Adams* case, 304 U. S. 307, at 310, 312-14, that the Indiana tax is not "for the transaction of business, since in many instances it hits the receipt of income by one who conducts no business."

Further, the City is wrong at p. 11 of its motion where it says that the court below held in this case that the New York City tax is a tax on "the privilege of carrying on business" and is therefore the same as the Indiana tax. The court below did not and could not say that the Indiana tax is a tax for the privilege of carrying on business. On that point this Court has already held that the Indiana tax is not such a tax, as above noted.

Conclusion

The question presented here is one of general importance. It involves the nature of the New York City tax and its correct application to thousands of taxpayers. It involves many millions of dollars of tax which are being collected on a continuing basis.

The opinion below adds to the confusion in the field of local taxation of, or measured by, gross receipts by eliminating in one fell swoop a distinction between the Indiana type of direct gross receipts tax and the tax on the privilege of doing business which this Court has carefully demarked in a series of decisions extending over a generation of time.

It is respectfully submitted that jurisdiction should be taken of this appeal for the purpose of clarifying the circumstances under which transportation by common carrier is significant in respect of interstate commerce.

It is further submitted that this Court should clarify the incidence of the New York City General Business and Financial Tax so far as Federal Constitutional protection of interstate commerce is concerned.

Appellee's motion should be denied and the substantial Federal questions here involved should be given plenary consideration by this Court.

Respectfully submitted,

Russell D. Morrill,
Attorney for Appellant.

Francis L. Casey,
Of Counsel.

December 1958.